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No. 1017

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE INTERLAKE STEAMSHIP COMPANY, PETITIONER

v.

MARCELLA R. NIELSEN and STEPHEN O'HEARNE, DEPUTY COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT O'HEARNE, DEPUTY COMMISSIONER, IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

JOHN W. DOUGLAS,
Assistant Attorney General,

MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-23) is reported at 338 F. 2d 879. The opinions of the district court (Pet. App. 8-16) and the findings and award of the Deputy Commissioner (Pet. App. 2-7) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on December 3, 1964 (Pet. App. 24-25), and a timely

petition for rehearing was denied on January 12, 1965 (Pet. App. 25). The petition for a writ of certiorari was filed on March 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly sustained the Deputy Commissioner's determination that the death of a shipkeeper resulting from a skull fracture occasioned by impact on the frozen waters of Lake Erie after the decedent drove his car off the end of a dock was "an injury occurring upon the navigable waters of the United States" compensable under the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part (as it appears in the United States Code):

> § 902 [Section 2 of the Act]. *Definitions.*
>
> When used in this chapter—
>
> * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment * * *.
>
> * * * *
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the

navigable waters of the United States (including any dry dock).

* * * *

§ 903 [Section 3 of the Act]. *Coverage.*

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * *

§ 920 [Section 20 of the Act]. *Presumptions.*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * *

§ 921 [Section 21 of the Act]. *Review of compensation orders.*

* * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order * * *.

STATEMENT

The facts were found by the Deputy Commissioner (Pet. App. 2-6) and are undisputed here.

In January 1959, Carl O. Nielsen was employed by petitioner as a shipkeeper of the SS ARCTURUS, which was then winter-moored to a wharf in Maumee Bay, Port of Toledo, Ohio. Petitioner was a self-insurer under the Longshoremen's and Harbor Workers' Compensation Act, and had other employees engaged in maritime employment. The shipkeeper's duties were on a twenty-four-hour-a-day, seven-day-a-week basis, and included inspections of the ship and its mooring lines. The lights of an automobile were useful to the shipkeeper in inspecting the shore end of the lines. Although there were facilities for the shipkeeper to sleep and eat aboard ship, Nielsen habitually ate his supper at home, with the acquiescence of his superiors.

Between 9 and 10 p.m., on January 10, 1959, after having had his supper at home, Nielsen left by automobile for the ARCTURUS. He apparently drank from six to eight ounces of whiskey, but did not lose control of his senses (Pet. App. 4-5).

In the early morning hours of January 11, 1959, while driving between the entrance gate of the wharf and its outer end, his car struck the mooring lines, and went over and off the wharf into the ice and water. As a result of that accident, he sustained skull fractures and brain damage which caused his death. His body was recovered from the waters of the bay the next day (Pet. App. 4-5).

Nielsen's widow filed a claim for compensation benefits under the Longshoremen's Act for herself and their two children.[1] After having found the facts as set forth above, the Deputy Commissioner concluded that the injury arose out of and in the course of Nielsen's employment, that it was not occasioned solely by his intoxication, and that it occurred on the navigable waters of the United States (Pet. App. 5). Accordingly, he entered an award in favor of the widow in the amount of $28.35 per week, plus $12.15 per week for each minor child for a total of $52.65 per week[2] (Pet. App. 6-7).

The employer, as self-insurer, brought suit in the district court under Section 21 of the Longshoremen's Act, 33 U.S.C. 921, *supra*, p. 3, seeking to have the compensation order set aside on the grounds (1) that Nielsen's death did not arise out of his employment, and (2) that the injury was not compensable under the Longshoremen's Act[3] because his

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[1] The record does not suggest that she filed a claim for compensation under the Ohio Workmen's Compensation Act, and we are advised by her counsel that no such claim was in fact filed.

[2] Unlike the Ohio statute, which would have limited recovery for Nielsen's death to $18,000 (Ohio Revised Code § 4123.59(B); Pet. 3), the Longshoremen's Act imposes no ceiling for death or total and permanent disability benefits. 33 U.S.C. 914(m). Under the compensation order in this case, it is estimated (on the premise of no remarriage and the widow's life expectancy to 74) that Nielsen's widow and children will receive a gross amount of approximately $68,000. 33 U.S.C. 909 (b).

[3] Petitioner asserts that "The Ohio statute clearly would cover the death here in question." Pet. 3. But, as noted above,

death did not occur "upon navigable waters of the United States" within the meaning and coverage of that Act. The district court sustained the Deputy Commissioner's finding that the death arose out of and in the course of his employment (Pet. App. 10-11). The court set aside the award as unlawful, however, ruling that the injury was not one occurring upon navigable waters within the meaning of the Longshoremen's Act because "the impetus which put in motion the sequence of events resulting in the fatal accident came from the land, and operated on the person injured while on land" (Pet. App. 14, 12-15). In a supplemental opinion, the court added as a reason for setting aside the award the fact that Nielsen "was performing no duty on navigable waters" and had no "purpose or intention of doing anything, or going, upon the navigable waters at the time of his fatal accident" (Pet. App. 16).

The court of appeals reversed. Noting that the district court had set aside the Deputy Commissioner's award solely on the ground that the fatal injury did not occur upon navigable waters, the court stated (Pet. App. 18), "As we see this case, decedent broke his skull on that very substance." Noting that the decedent was not "killed (or injured) until the impact on the frozen substance of the navigable waters at the end of the dock," the court ruled that the land-

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Mrs. Nielsen apparently did not file any written claim for State compensation benefits. Accordingly, the Ohio statute of limitations would appear to bar recovery under the Ohio Act. Ohio Revised Code, § 4123.84.

based origin of the impetus did "not alter the fact that the situs of his injury and death was clearly within the scope of admiralty jurisdiction." Pet. App. 23.

ARGUMENT

This case presents the single narrow question of whether the deputy commissioner may award compensation under the Longshoremen's Act for an injury (and resulting death) to a maritime worker which was sustained upon the navigable waters of the United States, although the impetus for the accident operated upon him while he was upon a wharf. The court's decision upholding the compensation award is in accord with the settled principles established by prior decisions of this Court under the Longshoremen's Act. There is no conflict between circuits, and no occasion for review by this Court.

Section 3 of the Longshoremen's Act (33 U.S.C. 903, *supra*, p. 3) provides that the Act is applicable to an "injury occurring upon the navigable waters of the United States." In *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 116, 117, this Court ruled that the Longshoremen's Act was intended "to provide compensation for *all* injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law" (emphasis added). In this case the Act was applicable because the injury and death occurred upon the ice and in the navigable waters of Lake Erie.

Petitioner contends, however, that the admiralty jurisdiction, and hence the Longshoremen's Act, does not extend to an injury which occurs as a result of a land-based impetus which takes effect while the employee is on land or on a wharf, even though the injury is actually sustained and consummated upon the navigable waters (Pet. 11-14). While the rule urged by petitioner may appear "simple and easily applied" to experienced admiralty practitioners, it is, to say the least, a little difficult to explain to an injured maritime worker, or his survivors, why any injury taking place wholly upon and in the navigable waters of Lake Erie is not an injury "occurring upon the navigable waters of the United States" within the meaning and coverage of the Longshoremen's Act.[4] Any such artificial and technical restriction imposed on the natural meaning of the Act's coverage provisions would tend to defeat its purpose of providing a speedy, certain and inexpensive remedy. *Calbeck* v. *Travelers Insurance Co.*, *supra*; *Davis* v. *Department of Labor*, 317 U.S. 249, 254.

Petitioner relies primarily upon *Smith & Son* v. *Taylor*, 276 U.S. 179, for what it contends is the established rule. In that case, which involved events occurring before the enactment of the Longshoremen's Act, the Court sustained an award of State

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[4] It has been settled since *The Plymouth*, 3 Wall. 20, 34-35, that admiralty tort jurisdiction depends upon the place of "the substance and consummation" of the injury rather than upon the place of the origin of the wrong. Thus, "where the negligent act originates on land and the damage occurs on water, the cause of action is within the admiralty jurisdiction." *Smith* v. *Lampe*, 64 F. 2d 201, 202 (C.A. 6).

workmen's compensation benefits for a longshoreman who was struck by cargo while on the wharf, and knocked into navigable waters where he drowned. In this case, however, the maritime worker was not struck while on the wharf, so that there was no injury occurring there.[5] Moreover, as the court of appeals noted (Pet. App. 20), *Smith* v. *Taylor* merely sustained the constitutionality of the award of State workmen's compensation benefits by holding that the injury was not "exclusively" within admiralty jurisdiction. 276 U.S. at 182.[6] Thus, here, the land-based origin of the impetus may well have been sufficient to sustain an award of State compensation, but the fact that the injuries were sustained upon the navigable waters is also sufficient to bring them within the Longshoremen's Act, which in terms applies to injuries "occurring upon the navigable waters of the United States." Sec. 3, 33 U.S.C. 903(a).[7]

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[5] Accord: *Thomson* v. *Bassett*, 36 F. Supp. 956 (W.D. Mich.) (sustaining Longshoremen's Act coverage where a worker fell off a wharf into the water). Compare, *Atlantic Stevedoring Co.* v. *O'Keefe*, 220 F. Supp. 881 (S.D. Ga.), pending on appeal, C.A. 5, No. 21770.

[6] As such, the decision probably should be read as a precursor to the twilight zone doctrine later articulated in *Davis* v. *Department of Labor*, 317 U.S. 249. See, *infra*, p. 11. The Second Circuit has recently joined the Sixth Circuit in giving *Smith & Son* v. *Taylor* such a reading. *Michigan Mutual Liability Co.* v. *Arrien* (C.A. 2, No. 29241, April 5, 1965).

[7] As petitioner concedes (Pet. 10), this Court's decision in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, makes it clear that the Longshoremen's Act applies to injuries upon navigable waters, even though State workmen's compensation might also be available.

The other decisions relied upon by petitioner either sustained the Longshoremen's Act coverage or federal admiralty jurisdiction,[8] or concerned accidents where the injury was sustained wholly upon the wharf.[9] There is no conflict between the decision of the court below and the decisions of other federal appellate courts. Indeed, recent decisions of other courts of appeals have repeatedly sustained the deputy commissioners' awards of Longshoremen's Act compensation against contentions that the injury did not occur upon navigable waters within the meaning of the Act. *Boston Metals Co.* v. *O'Hearne*, 329 F. 2d 504 (C.A. 4), certiorari denied, 379 U.S. 824; *Holland* v. *Harrison Bros. Dry Dock & Repair Yard*, 306 F. 2d 369 (C.A. 5); *Michigan Mutual Liability Co.* v. *Arrien* (C.A. 2, No. 29241, April 5, 1965).

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[8] *L'Hote* v. *Crowell*, 54 F. 2d 212 (C.A. 5), reversed on other grounds, 286 U.S. 528; *Lowe* v. *Central R. Co. of New Jersey*, 113 F. 2d 413, 415 (C.A. 3) (where the court ruled that a shipkeeper's drowning was an injury occurring upon navigable waters, but that it did not arise out of his employment); *Thibodeaux* v. *J. Ray McDermott & Co.*, 276 F. 2d 42 (C.A. 5) (holding that the courts should not intervene until the Deputy Commissioner had an opportunity to rule on the question of whether the injury occurred upon navigable waters); *Minnie* v. *Port Huron Terminal Co.*, 295 U.S. 647 (sustaining maritime tort jurisdiction); *The Admiral Peoples*, 295 U.S. 649 (also sustaining maritime tort jurisdiction; *Vancouver S.S. Co.* v. *Rice*, 288 U.S. 445 (sustaining admiralty tort jurisdiction for injury occurring aboard ship upon navigable waters, although the resulting death occurred upon land).

[9] *Swanson* v. *Marra Brothers*, 328 U.S. 1; *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82, 84 (C.A. 4).

Even if there were a reasonable basis for doubt as to whether the injury here occurred upon navigable waters within the meaning and coverage of the Act, the statutory presumption of coverage (Section 20(a), 33 U.S.C. 920(a), *supra*, p. 3) is sufficient to sustain the claimant's election to seek Longshoremen's Act benefits. For it can hardly be denied that the claimant and the deputy commissioner were reasonable in believing that the injury in this case, which was consummated upon the navigable waters, was an injury occurring upon the navigable waters within the meaning and coverage of the Longshoremen's Act. No more need be shown to sustain the claimant's election and the award by the Deputy Commissioner. *Davis* v. *Department of Labor*, 317 U.S. 249, 256-257.[10] Indeed, to overturn the award here might be to leave the claimant without a compensation remedy,[11] the very result which the Longshoremen's Act was designed to prevent. *Davis* v. *Dept. of Labor, supra*, 317 U.S. at 254; *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 116-117.

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[10] Accord: *Holland* v. *Harrison Bros. Dry Dock & Repair Yard*, 306 F. 2d 369 (C.A. 5); *Michigan Mutual Liability Co.* v. *Arrien* (C.A. 2, No. 29241, April 5, 1965). See also, *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273; *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366.

[11] For it appears, as we have noted above, that the claimant here would be barred by limitations from seeking recovery under the State compensation act. See, *supra*, pp. 5-6, fns. 1 and 3.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

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